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No. 01-178

IN THE

Supreme Court of the United States

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ENERGY MARKETERS ASSOCIATION, THE ELECTRICITY CONSUMERS RESOURCE COUNCIL AND THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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The National Energy Marketers Association, the Electricity Consumers Resource Council and the Independent Petroleum Association of America respectfully file this brief as *amici curiae* in support of Petitioner, Trigen-Oklahoma City Energy Corporation ("Trigen"). This brief is filed with the written consent of all parties.[1]

INTEREST OF AMICI CURIAE

The National Energy Marketers Association ("NEM") is a national trade association representing wholesale and retail marketers of energy and energy-related products, services, information and technologies throughout the United States. NEM's membership includes traditional energy suppliers (as well as wind and solar power), billing and metering firms, internet energy providers, energy-related software developers, risk managers, energy brokerage firms, information technology providers and suppliers of distributed generation.

The Electricity Consumers Resource Council ("ELCON") is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable and efficient electricity supply for all users at competitive rates. Its members have facilities in most of the fifty states, producing a wide range of products. ELCON's member companies account for approximately five percent of all the electricity consumed in the United States.

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[1]Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their counsel and members made a monetary contribution to the preparation or submission of the brief. Petitioner is a member of NEM and ELCON.

The Independent Petroleum Association of America ("IPAA") is a national association representing approximately 8,000 independent crude oil and natural gas producers in the United States. IPAA's members produce approximately two-thirds of the natural gas consumed in the United States and drill approximately 85% of the wells in the United States.

Amici urge that this Court grant certiorari because the Tenth Circuit's decision in *OG&E* inappropriately expands the state action doctrine during a period of deregulation when there is the greatest risk of unchecked exercise of market power. The Tenth Circuit decision telegraphs to utilities that their anticompetitive conduct will be condoned under the state action doctrine even where the anticompetitive conduct is attributable to the private party rather than to state regulation.

SUMMARY OF ARGUMENT

The U.S. electric industry is on a restructuring path laid by federal and state policies mandating increased competition and encouraging the use of alternate, more efficient technologies. Confronted with such change, there is a risk that some incumbent electric utilities that have long enjoyed monopoly benefits may wish to preserve their status and exclude competitors. Accordingly, vigilant enforcement of the antitrust laws is vital at this stage of the market's evolution.

Regulated utilities enjoy "state action" immunity only insofar as they are engaged in activities that are both clearly authorized and actively supervised by the state. These dual requirements ensure that state sovereignty may be invoked to trump the antitrust laws only when the utility is engaged in conduct fairly attributed to the state. The utility in this case ("OG&E") could not have been furthering the state's interest when it monopolized the cooling services market by falsely disparaging Trigen's rates and services;

misrepresenting the benefits of electric cooling systems; and making payments to the son of a county commissioner whose vote was needed to prevent the county from extending its contract with Trigen.

The Tenth Circuit reached the conclusion that such conduct is immunized after a simplistic inquiry: does a utility sell only a regulated product? This approach converts the Court's long-standing *functional* approach to immunity into a mere test of *status*. The fact that an electric utility delivers electricity at regulated rates should be the *beginning* of the analysis of state action immunity, not the *end*.

If market power is unchecked, providers of competitive energy services and innovative technologies would be discouraged from entering even partially-regulated geographic markets; consumers would be denied the benefits of competition; and states would be denied the flexibility necessary to restructure utility regulation. Thus, there is a compelling need for review of this unprecedented decision expanding antitrust immunity in the electricity industry at the very time when market power concerns are greatest.

ARGUMENT

I. THERE IS A COMPELLING NEED TO REVIEW THE TENTH CIRCUIT DECISION EXPANDING ANTITRUST IMMUNITY AT THE VERY TIME WHEN MARKET POWER CONCERNS ARE GREATEST.

Even at the zenith of federal and state regulation, electric utilities were not *exempt* from the antitrust laws. "[S]ince our decision in *Otter Tail Power Co. v. United States*, there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976) (*citing Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)). *See also Town of Concord v. Boston*

Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) ("Even though Boston Edison is a regulated firm, it has no blanket immunity from antitrust laws.") (Breyer, C.J.) (citations omitted).

Nor do utilities enjoy *immunity* when they are "engage[d] in business activity in competitive areas of the economy." *Cantor*, 428 U.S. at 596 (footnote omitted). Thus, the "'Magna Carta of free enterprise'" applies at the intersection of commercial activity and state action. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (*quoting United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

Otter Tail was one of the first cases to wrestle with the issue of anticompetitive conduct by entrenched monopolists who sought to preempt competition from alternative energy sources. In the ensuing years, federal and state legislators and regulators have attempted to promote competition in the electric industry through restructuring. Restructuring began in earnest in the 1990s and took a major step forward when the Federal Energy Regulatory Commission ("FERC") issued the "open access" rules that gave rise to the matter now before the Court in *Enron Power Marketing, Inc. v. FERC*.[2]

Those restructuring efforts also gave rise to OG&E's "Plan of Action" that served as a roadmap for the jury's finding of monopolization in this case. *See* 10th Cir. App. vol. IX at 2426-30. As OG&E's executives testified at trial, Trigen's cooling system not only consumed less electricity than the electric chiller systems promoted by OG&E but also "co-generated" electricity. Upon the anticipated

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[2] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. granted sub nom Enron Power Mktg., Inc. v. FERC*, 121 S. Ct. 1185 (2001) (oral argument scheduled for October 3, 2001).

restructuring scheduled to take effect in 2002, Trigen would have been in a position to compete directly with OG&E. OG&E's anti-competitive conduct is a direct response to competition from Trigen. Clothing such responses in antitrust immunity will thus frustrate federal and state efforts to restructure the electricity industry.

The FERC, the Department of Justice and recent lower court rulings have all recognized the need for increased antitrust scrutiny to assure the success of restructuring.

> Utilities that own or control transmission facilities naturally wish to maximize profit. The transmission-owning utilities thus can be expected to act in their own interest to maintain their monopoly and to use that position to retain or expand the market share for their own generated electricity, even if they do so at the expense of lower-cost generation companies and consumers.

Transmission Access, 225 F.3d at 16 (discussing the rationale of FERC's "open access" rules) (citations omitted).

The Antitrust Division of the Department of Justice has emphasized the need for antitrust vigilance in transitioning to deregulation:

> Because of the existing structure of the electric power industry, there are likely to remain significant market power problems in the transmission and generation of electricity, even as the industry is restructured to increase the role of competitive market forces.[3]

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[3] Electricity Competition: Market Power, Mergers and Public Utility Holding Act, Statement of A. Douglas Melamed, Principal Deputy

Enforcement actions likewise demonstrate the importance of vigorous enforcement of the state action doctrine at a time when the electric utility industry is undergoing the early stages of deregulation. Announcing the filing of the Justice Department's antitrust case against Rochester Gas & Electric ("RG&E"), Assistant Attorney General Joel Klein stated:

> As the electric industry becomes increasingly deregulated, vigorous antitrust enforcement is absolutely essential to ensure that consumers benefit from competition,". . . . "This case should send a wake-up call to electric utilities. We will not tolerate private arrangements designed to thwart the introduction of competition into this important industry.[4]

The RG&E case involved a contract between RG&E and the University of Rochester in which RG&E promised to sell electricity to the university at reduced rates in exchange for the university's promise not to compete against RG&E in the sale of electricity to consumers. Reminiscent of Trigen's activity in this case, the university had intended to build a cogeneration facility—unregulated generation that would have competed with RG&E for customers of electric power.

Assistant Attorney General, Antitrust Division, before the Committee on Commerce, Subcommittee on Energy and Power (May 6, 1999), *available at* http://www.usdoj.gov/atr/public/testimony/2421.htm. *See also* Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Injecting Competition into Regulated Industries and Utilities, Address before the Public Utility, Communication and Transportation Section of the American Bar Association (Apr. 20, 1995) ("[E]ffective deregulation . . . requires alert antitrust enforcement to ensure that we do not replace regulated monopolies and cartels with unregulated ones."), *available at* http://www.usdoj.gov/atr/public/speeches/95-04-20.txt.

[4] Press Release, U.S. Dept. of Justice (June 24, 1997), *available at* http://www.usdoj.gov/atr/public/press_releases/1997/1153.htm.

Like OG&E, RG&E argued that its naked anticompetitive conduct was subject to state action immunity. The district court rejected that defense:

> While it is true that under New York law a utility company may negotiate discounted rates with certain qualified consumers, and that discounting rates is carefully supervised by the New York Public Service Commission to prevent abuse of such a practice, New York law does not authorize utility companies to offer discounted rates to potential competitors *for the purpose of preventing those potential competitors from becoming actual competitors.* Thus, while RG&E may be correct that discounting electricity rates under New York law does not violate federal antitrust laws, that conclusion does not end the inquiry.
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> * * *
>
> I find that the goal of the State's policy of offering lower utility rates is to reduce utility costs and retain or attract businesses based on those lower utility costs. Competition from "cogenerators" in the sale of electricity is consistent with that goal. . . . Accordingly, I find that the State's policy of allowing discounted rates does not implicitly authorize anticompetitive actions on the part of Utilities seeking to prevent potential competitors from entering the market.[5]

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[5] *United States v. Rochester Gas and Elec. Corp.*, 4 F. Supp. 2d 172, 175-176 (W.D.N.Y. 1998) (emphasis added).

Particularly as ongoing deregulation heightens concerns about market power, there is a compelling need for the Court to review the Tenth Circuit's decision expanding state action immunity in the electricity industry. Failure to do so will signal to utilities that it is "business as usual" and thus undermine the goals of restructuring.

II. CERTIORARI IS WARRANTED TO REEXAMINE THE TENTH CIRCUIT'S UNPRECEDENTED EXPANSION OF THE STATE ACTION DOCTRINE.

A. The Decision Below Violates Both the Origin and Purpose of the State Action Immunity Doctrine.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Court recognized immunity for action by state officials who approved agricultural production limits under a state statute authorizing them to "stabilize" agricultural prices. Subsequent cases presented more difficult decisions because they involved non-governmental entities or less obvious legislative mandates. Throughout, however, the Court has sought "to ensure that the state action doctrine will shelter only the *particular anticompetitive acts* of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget,* 486 U.S. 94, 100-101 (1988) (emphasis added); *see also Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985) ("Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.").

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Court first contemplated extending state action immunity to an unregulated activity of an electric utility company but held that even a "pervasively regulated" electric utility could be held liable for monopolizing the market for an unregulated product. The Court considered the purposes of

the state action doctrine—to avoid penalizing a private party for obeying the state and to avoid conflict between antitrust laws and state regulation—and found that the purposes of the doctrine would not be served by immunizing a utility when it "engages in business activity in competitive areas of the economy", *e.g.*, the unregulated market for light bulbs. 428 U.S. at 596.

The Tenth Circuit did not attempt to distinguish *Cantor* on the grounds that Michigan's regulatory scheme was less comprehensive or less actively supervised than Oklahoma's.[6] Rather, the court relied solely on the grounds that Detroit Edison "was distributing an unregulated product—light bulbs" *and* selling electricity at state-regulated rates, whereas, "OG&E only sells electricity—at state-regulated rates." Pet. App. 12a (footnote omitted). There is no meaningful distinction between *giving* away light bulbs and merely *promoting* the use of electric chillers to

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[6] On its face Michigan's regulatory scheme appears to be as comprehensive as Oklahoma's current scheme. Compare *Cantor*:

> A Michigan statute vests the Commission with 'complete power and jurisdiction to regulate all public utilities in the state . . . .' The statute confers express power on the Commission 'to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities.'

428 U.S. at 584 (footnote omitted), with *Trigen*:

> The Oklahoma Constitution . . . provides that the OCC 'shall have the power and authority and be charged with the duty of supervising, regulating and controlling all . . . transmission companies doing business in this State, [and] in all matters relating to the performance of their public duties and their charges therefor . . . .'

Pet. App. 9a (citations omitted).

stimulate demand for electricity. In both cases the result is the same: the utilities' electricity marketing plans injured competition in the market for an unregulated product.

Here, instead of applying *Midcal's* two-prong test, the Tenth Circuit made a single inquiry: whether OG&E is a state-regulated entity. *See* Pet. App. 9a. This should have been the *beginning* of the state action immunity analysis, not the *end*. By stopping there, the Court of Appeals did not address the critical issue: Whether OG&E was pursuing the state's interest when it engaged in the "particular anticompetitive acts" proven here — disparagement, false representations and bribery for the express purpose of "remov[ing] customers from Trigen" in the unregulated market for cooling services.

In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court reiterated that the purposes of the Sherman Act and of *Parker* are "prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." 499 U.S. at 378. To remain faithful to those purposes, the Court carefully parsed the private defendant's actions and refused to extend antitrust immunity to conduct strikingly similar to OG&E's, *e.g.*, "trade libel" and "inducement to breach of contract." 499 U.S. at 384.

Amici respectfully submit that a similar analysis of the specific acts proven at trial in this case demonstrates the inapplicability of state action immunity.

B. The Tenth Circuit's Status-Based Holding is at Odds With the Court's Functional Approach to the Grant of Governmental Immunity to Private Parties.

The Tenth Circuit's grant of blanket immunity to OG&E violates not only specific state action immunity precedent, but also the Court's approach to immunity

generally.[7] The transfer of a sovereign's immunity to a private party turns on a careful analysis of the specific governmental functions that private party is fulfilling. And immunity so transferred is limited to those functions. For example, in *Forrester v. White*, 484 U.S. 219 (1988), the Court considered whether a judge discharging an employee enjoyed absolute immunity from liability:

> Running through our cases, with fair consistency, is a "functional" approach to immunity questions . . . Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.

Id. at 224.[8]

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[7] The Court has previously noted the parallels between state action immunity in the antitrust context and the state action inquiry conducted in the Civil Rights Act, 42 U.S.C. § 1983, and Fourteenth Amendment contexts. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 195 (1988) ("Although by no means identical, analysis of the existence of state action justifying immunity from antitrust liability is somewhat similar to the state action inquiry conducted pursuant to §1983 and the Fourteenth Amendment."). *See also Cantor*, 428 U.S. at 594 n.31 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)).

[8] *See also Clinton v. Jones*, 520 U.S. 681, 695 (1997) ("As our opinions have made clear, immunities are grounded in the 'nature of the function performed, not the identity of the actor who performed it.'") (citation omitted); *Briscoe v. Lahue*, 460 U.S. 325, 342 (1983) ("Our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."); *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982) ("in general our cases have followed a functional approach to immunity law"); *see also Richardson v. McKnight*, 521 U.S. 399, 416 (1997) ("immunity is determined by function, not status") (Scalia, J., dissenting).

A status-based rule also is inconsistent with the Court's rulings in the broader field of the state action doctrine. While it encompasses a wider range of factual situations, the doctrine requires a close *nexus* between the state and the specific challenged private conduct.

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for the purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-351 (1974) (citations and footnotes omitted). *See also Evans v. Newton*, 382 U.S. 296, 299 (1966) ("[W]here private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.").

A functional test for the extension of governmental immunity to non-government entities is essential to avoid the abuse of status—whether by a sitting President of the United States or executives of a state-regulated utility.

CONCLUSION

For the foregoing reasons, the *Amici* urge the Court to grant the Petition and correct an erroneous expansion of the state action doctrine that threatens to immunize anticompetitive conduct and shield unwarranted exercise of market power by utilities competing in unregulated markets.

Respectfully Submitted,

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